

1 second.

2 MR. LEVY: Can we add this -
3 maybe this is something we can add to the
4 agenda for discussions, so we don't have to go
5 through the process of submitting things to
6 you, protective order - let us find out what
7 our differences are first, and then we'll come
8 back to you if we need your guidance.

9 MR. SOLOMON: We are comfortable
10 with that, just so I understand that is
11 deferring the thing that we need to file on
12 Monday.

13 JUDGE SIPPEL: All right.

14 MR. LEVY: Yes, that's my
15 suggestion.

16 JUDGE SIPPEL: Although you might
17 want to give them some kind of notice.

18 (Simultaneous speakers.)

19 JUDGE SIPPEL: If we get back to
20 this, and it's still a matter of contention,
21 I am going to require everybody who wants to
22 take a deposition to do the same thing that I

1 am requiring the NFL to do, all right. And
2 then anybody who wants to oppose that can file
3 a motion for a protective order. I hope we
4 don't need that, but that's what the rules
5 require.

6 MR. SOLOMON: Just so I
7 understand, if we reach agreement with other
8 counsel, is there something we need to file?

9 JUDGE SIPPEL: No.

10 MR. TOSCANO: Could you give us
11 additional time to work out these issues
12 beyond today, because we have a court
13 conference with the New York judge as well
14 this afternoon, so it would help if we could
15 speak tomorrow morning.

16 MR. LEVY: That would be fine
17 with us.

18 JUDGE SIPPEL: You know what my
19 situation is, I'm not going to be here
20 tomorrow. I will be in for two days next
21 week, Monday and Tuesday. Wednesday, I'm
22 wheels up to San Francisco for better or for

1 worse. And I will be back the following week
2 on Tuesday. So let's think of Tuesday - let
3 me have a status report on Tuesday, can we do
4 that?

5 MR. LEVY: This coming Tuesday?

6 JUDGE SIPPEL: No, no, a week
7 from Tuesday.

8 MR. LEVY: A week from Tuesday?
9 Yes, that's fine.

10 JUDGE SIPPEL: That's being the
11 10th of February. And try and consolidate as
12 much as possible. Anybody can say what they
13 want to say, but try and consolidate it, just
14 exactly where you are and what's ready to be
15 done.

16 MR. BLAKE: But there are going
17 to be three buckets as I understand it for the
18 three different cases, is that right?

19 JUDGE SIPPEL: That's right, but
20 the principle applies - what we are talking
21 about is the principle of discovery.

22 MR. BLAKE: But apparently there

1 may be some difference between the three
2 buckets?

3 JUDGE SIPPEL: Absolutely.
4 Absolutely.

5 MS. WALLMAN: Relative to that,
6 Your Honor, we have been discussing, and I
7 expect that we will reach agreement on a
8 stipulation that there would not be a need for
9 fact witnesses in the Wealth TV cases.

10 MR. COHEN: Fact witnesses?

11 MS. WALLMAN: Deposition of fact
12 witnesses.

13 MR. COHEN: We've already agreed
14 to that.

15 MS. WALLMAN: Right.

16 JUDGE SIPPEL: Well, I don't need
17 to hear from anybody that doesn't have a
18 problem. I don't mean to be snide with that.
19 But no, I mean really, I'm trying to get the
20 problems on the table and see what we can do
21 with them.

22 But if there is still a problem, I

1 mean if you can tell me in the status report
2 that there is no problem that's great to hear.
3 Meantime I'm going to try and get these orders
4 out on the dates, and we will all understand
5 that there are things that come into people's
6 lives where sometimes adjustments have to be
7 made. And it's within the context of that
8 mentality that I am going to respect the order
9 to expedite.

10 It's different when you get, do it
11 as soon as possible, and do it within 60 days,
12 and that kind of stuff. It's two different
13 worlds.

14 MR. MILLS: Your Honor, are you
15 suggesting that there is a status report on
16 all three cases?

17 JUDGE SIPPEL: Yes, that would be
18 helpful. Even if the status report is no
19 problem, we are set to go.

20 MR. MILLS: And we could report
21 perhaps on the progress of the protective
22 order at that time as well?

1 JUDGE SIPPEL: I was going to get
2 to that, but yes, you've got to do that too.

3 The protective order that came in
4 from the bureau, attached to their time
5 schedule, I looked at it. It looks pretty
6 good to me. You folks now more about those
7 things than I do.

8 But I would just cut it back. Is
9 it really necessary to sign those statements
10 that on the pain of death -

11 MR. COHEN: Yes, if not worse,
12 Your Honor. The competitive issues are very
13 important.

14 Your Honor, we do have a couple of
15 concerns about the bureau's protective order
16 which of course was rescinded with respect to
17 the other - or part of those orders. But we
18 will discuss that with Ms. Wallman and we will
19 try to come to you with an agreed upon
20 protective order.

21 JUDGE SIPPEL: All right.

22 MR. COHEN: And I'm sure we will

1 do that in advance of the 10th.

2 JUDGE SIPPEL: All right.

3 MR. COHEN: There are some issues
4 about who sees what and business people who
5 have overlapping issues, and how we are going
6 to deal with the hearing. But we had
7 discussions about that before. We got
8 suspended in them; I'm hopeful we will work it
9 out again.

10 JUDGE SIPPEL: Okay, let me tell
11 you right up front what I don't want to see,
12 I don't want to see exhibits coming in - I'm
13 sorry, let me back off on that. I don't want
14 to get involved before the hearing with any
15 documents that aren't properly masked or
16 redacted or whatnot. I don't want to deal
17 with anything that is confidential unless the
18 parties ask me to or requests it. I don't
19 want to see that. I don't want that flying
20 around my office.

21 Unless you feel that - somebody
22 feels that I've got to look at it. But I

1 don't think I'll be seeing many documents
2 anyway before the hearing. And when it comes
3 time to the admissions date, I'm going to -
4 I'm inclined to go pretty much along with what
5 you say, what you agreed to.

6 My problem is, and my reservation
7 is with respect to findings, if I can't make
8 sense of an issue, a fact issue, without
9 somehow or other getting into that, I know
10 that I can - well, you all will have to do the
11 work. I mean if you are going to give me an
12 idea that you want stuff eliminated, then you
13 are going to have to write it that way.

14 MR. FREDERICK: Your Honor, this
15 is David Frederick from MASN.

16 JUDGE SIPPEL: Yes, sir.

17 MR. FREDERICK: I just want to
18 point out that the rates that are charged by
19 sports networks is highly confidential and
20 proprietary information, but the core of
21 Comcast's putative business justifications is
22 that MASN's rate is more expensive than it is

1 worth, and our contention is that Comcast
2 charges more than MASN does.

3 And so a rate comparison is
4 absolutely crucial to an understanding of the
5 discrimination issues, as well as to whether
6 or not MASN's rate is reasonable for purposes
7 of ordering carriage.

8 And that analysis depends in part
9 on the discovery and ascertainment of the
10 rates that Comcast charges not only its own
11 affiliated carrier but also unaffiliated
12 distributors. So those rates, which are
13 confidential information, are going to have to
14 be put before you in a proper understanding of
15 the discrimination issues for liability in
16 this case, as well as for remedy.

17 And I just want to put that up
18 front in the interests of full candor.
19 Because where there is going to be potential
20 issues with Comcast are going to be how much
21 can experts look at to give you an expert -

22 JUDGE SIPPEL: I don't mean

1 policy experts. Don't get me wrong on that.
2 I would expect the expert to see whatever it
3 is they need. But in terms of testifying or
4 putting evidence in, why do I have to have
5 specific numbers? If I have ranges, or if I
6 have this is more than that, substantially
7 more, I mean how much do I need as far as
8 precise numbers go?

9 MR. FREDERICK: MASN is perfectly
10 comfortable with presenting in an open forum
11 masked numbers so that references can be made
12 to documents that are filed with confidential
13 designations so that you can see the spread of
14 the range of rates, but we simply want to put
15 forward to you that that is an important part
16 of the case of discrimination and/or remedy,
17 and that although those might be filed in
18 written form under seal, and cloaked in some
19 fashion in oral testimony, that is going to be
20 material that will be in your office, and it's
21 necessary for a decision in the case.

22 JUDGE SIPPEL: Well, I will do

1 what I have to do, obviously. But let me go
2 back to the expert. You said you don't want
3 to get - it is highly confidential, highly
4 commercially sensitive to give specific
5 numbers as to rates for A versus rates for B,
6 for the same service basically.

7 Why couldn't the expert just
8 testify as to what the spread was? Say there
9 is a 10 point different, there is a 20 point
10 difference? His examination of the evidence
11 shows there is a 20 point difference, which is
12 outside the range of reasonableness. Anything
13 wrong with that?

14 MR. FREDERICK: I don't think
15 there would be anything wrong with that, just
16 so long as there can be an analysis of those
17 rates, and that the experts had the
18 opportunity to examine those rates.

19 JUDGE SIPPEL: Oh, I want the
20 experts - definitely, the experts should go
21 into that knee deep. It's me, how much do I
22 have to deal with that? I want to move these

1 - I want to get a decision out as rapidly as
2 I can. How deep do I have to get into that?
3 If I have to, I have to. But I mean if there
4 is no argument that that particular expert on
5 that particular fact is right, I mean he says,
6 look, there is a 10 point spread. Nobody
7 objects to that. I mean as far as it being
8 accurate. Why do I have to look at the
9 underlying data?

10 MR. FREDERICK: Your Honor, I
11 don't know that there would be any reason for
12 you to look at the underlying data subject to
13 verifying that the expert was accurately -

14 JUDGE SIPPEL: Right, but I'm
15 telling you up front that I don't intend to do
16 that unless there is a specific objection
17 raised in the hearing that, "oh no, Your
18 Honor, he has that wrong."

19 Now obviously you could go and
20 counter something, but you can't make an
21 objection where you say he's wrong, because
22 actually our number is this and their number

1 is this. You can say I object to that; we are
2 not going to let that go by. Then I am going
3 to have to look - somehow or other I'm going
4 to have to look at it.

5 MR. FREDERICK: Your Honor,
6 subject to your order today that the experts
7 are going to be allowed to look at these
8 contracts and this data, we are perfectly
9 prepared to work with Comcast later on prior
10 to the hearing to figure out the proper way to
11 cloak that information so that you don't feel
12 subject to restrictions on data that you are
13 not comfortable having been exposed to.

14 We just want to be able to prove
15 our case.

16 JUDGE SIPPEL: I understand that.
17 No, I'm not - we're right on the same wave.
18 Does anybody else have any objection to what
19 we are talking about here? Anybody - nobody
20 has any objection to their experts seeing
21 everything, do they?

22 MR. TOLLIN: Well, I'm not sure

1 every expert needs to see -

2 JUDGE SIPPEL: Not every expert,
3 but experts who are going to testify on a
4 certain point are going to have to see all the
5 evidence that he needs or she needs on that
6 particular point that is available. That's a
7 given. But I don't need to do all that; I
8 shouldn't have to. And I'm going to modify
9 that order too; when you submit - I didn't
10 know this was going to be this much of an
11 issue, I should have obviously - you are going
12 to submit proposed decisions or recommended
13 decisions in both forms, both formats. You
14 know like you do with the Federal Trade
15 Commission. You do one that is redacted and
16 one that is not. So I could file under seal
17 the one that I agree with, that is not
18 redacted, and then the one that goes out to
19 the public is going to have, it's going to
20 look like an FBI thing.

21 MR. SOLOMON: Your Honor, I do
22 want to raise one point about the experts not

1 for you to decide, but hopefully we will work
2 it out. But there could become an issue the
3 degree to which if the experts involved are
4 experts that are essentially negotiating
5 against Comcast in other cases, we are hoping
6 to work out certain restrictions voluntarily,
7 and hopefully that won't come to your
8 attention. But I just wanted to flag, that
9 could be an issue down the road.

10 JUDGE SIPPEL: Could you explain
11 that again to me? They would be doing
12 negotiations?

13 MR. SOLOMON: If there is an
14 expert who is appearing for one of the
15 complainants and getting access to information
16 about our contracts, we then have concerns
17 that that expert separately could be hired by
18 another programmer to negotiate, and now would
19 know all of - we have seen a number of your
20 contracts, and now we can use that information
21 in other contexts.

22 JUDGE SIPPEL: Well, can't you

1 put that right in the protective order?

2 MR. SOLOMON: We hope to work
3 things out.

4 MR. FREDERICK: The problem, Your
5 Honor, is that Comcast initially proposed a
6 three-year moratorium on the expert being able
7 to engage in earning a living as an expert in
8 the value of sports programming which is
9 completely unacceptable for anybody who is
10 trying to earn a living in this particular
11 economy.

12 We proposed a three-month
13 restriction, and Comcast has rejected that.
14 We are - we'd like to reserve the right to
15 come back to you if Comcast doesn't come down
16 to a more reasonable form to something that is
17 commercially reasonable limitation on our
18 outside experts' ability to earn a living.

19 (Simultaneous speakers.)

20 JUDGE SIPPEL: I'm sorry, Ms.
21 Wallman.

22 MS. WALLMAN: Wealth TV has the

1 same issue.

2 JUDGE SIPPEL: Same issue as?

3 MS. WALLMAN: That Mr. Frederick
4 just identified.

5 MR. MILLS: Well, the fact is,
6 Your Honor, this should be resolved - the
7 parties should have a chance to try to resolve
8 this and propose, and if we can't agree -

9 JUDGE SIPPEL: No, no, I agree
10 with all that.

11 MR. MILLS: But the fact is that
12 these experts, Your Honor, are in the business
13 of consulting, and the information they get
14 about the programming decisions and the
15 internal information about the defendants in
16 this case is valuable commercial,
17 competitively sensitive information - highly
18 competitively sensitive information - and
19 there has got to be some way to protect it.
20 Both sides have an interest here, and it has
21 to be worked out.

22 JUDGE SIPPEL: All right, that's

1 fair. How is it going to work if you are
2 approached going up to the bureau and doing it
3 on the - doing it on the cheap with the
4 papers, how would that work, same thing? Or
5 you wouldn't be as much concerned about it.
6 I mean they are the ones that have the
7 protective order.

8 MR. COHEN: The parties didn't
9 exchange the information, Your Honor, so we
10 were operating in a different context.

11 JUDGE SIPPEL: Okay. I think
12 that is it.

13 MR. COHEN: We wanted to clarify
14 one last thing, Mr. Beckner's point.

15 MR. BECKNER: Oh, yes, it's the
16 interruption I made.

17 JUDGE SIPPEL: I'm sorry.

18 MR. BECKNER: I just want to be
19 clear that all the defendants' witnesses
20 testify second at a trial, and so if there
21 weren't prefiled testimony, their direct
22 testimony would likely respond in part to the

1 direct testimony of the plaintiff. And all
2 I'm going to be able to be sure of is that at
3 the hearing, if my witnesses and the other
4 defendants' witnesses, in addition to their
5 pre-filed testimony, could react to anything
6 that was said by Wealth's witnesses at the
7 hearing.

8 MR. COHEN: Which is consistent,
9 Your Honor, with the burden of proof.

10 JUDGE SIPPEL: Yes, I was going
11 to say, they have got the burden of going
12 forward, and you've got to meet what they put
13 up. So if you've got a witness that can say,
14 well, I listened to that or I read that
15 testimony, and I can't agree with that.

16 MR. FREDERICK: But that is also
17 the purpose of having both sides prepare
18 written direct -

19 JUDGE SIPPEL: Well, that's true.
20 Unless there is a slip and somebody goes off
21 the script.

22 MR. FREDERICK: Well, if MASN for

1 instance puts forward a witness and says, Your
2 Honor, he has written direct testimony, we put
3 him up for cross-examination, then they have
4 absolutely no basis for saying we want to put
5 a witness up to start talking about what that
6 witness said, because we hadn't added to his
7 direct testimony.

8 JUDGE SIPPEL: Well, how is that
9 going to -

10 MR. COHEN: Your Honor, let me
11 try to address that. There are two separate
12 issues.

13 First of all we have a right, we
14 have a right under the rules to insist on oral
15 testimony. The order that we submitted to
16 Your Honor for the Wealth cases said we - gave
17 us the option but not the obligation to submit
18 written testimony.

19 We hear Your Honor's preference
20 for written testimony, and we are prepared to
21 do written testimony. But that does not mean
22 that we are suddenly engaged in a case in

1 which there is no plaintiff nad no defendant
2 and no burden of proof.

3 It is the complainant's burden of
4 proof. And by agreeing to exchange written
5 direct testimony we have not given up the
6 right to respond. Every trial - excuse me Mr.
7 Frederick - you have the right to cross-
8 examine a witness and then put on your witness
9 when you are the defendant, when you are
10 responding.

11 And what Mr. Beckner is making
12 clear is that we are not giving up that right.
13 If they want to restrict us to the four
14 corners of the written direct testimony then
15 we have to go after them. We can't have
16 simultaneous exchanges of written direct
17 testimony and then say we're somehow barred
18 from addressing their issues.

19 They have the burden of proof.
20 They are the plaintiff, but for the written
21 testimony which we are putting in for the
22 convenience of the court and to expedite the

1 proceeding, we wouldn't make any decisions
2 about what our testimony would look like until
3 after the plaintiff had completed his case.
4 And we can't be in a position because we are
5 trying to expedite the case that we have
6 somehow lost the ability to force them to put
7 them to the burden of their proof and respond
8 appropriately, and I think that is Mr.
9 Beckner's point.

10 And if Mr. Frederick or the other
11 plaintiffs object to that, then we can't have
12 simultaneous exchange, just like we don't have
13 simultaneous exchange in the expert reports.
14 The expert reports respect the burden of
15 proof. The plaintiffs are putting in their
16 expert reports, and we are going second. If
17 the argument is going to be that we can't do
18 what Your Honor has just said is perfectly
19 appropriate, then we will submit our written
20 direct testimony a week after the plaintiffs.
21 We don't have to delay any of the other dates,
22 but it has to be one or the other.

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1 MR. FREDERICK: Your Honor, both
2 sides in all of these cases have already put
3 forward written declarations. We have got
4 voluminous submissions of complaints and
5 answers. The issues are very clear and
6 straightforward. The Media Bureau in fact
7 didn't even think there needed to be live
8 witness testimony.

9 This is not a murder trial. This
10 is a program carriage complaint. The issues
11 are quite straightforward, and much of the
12 cases have already been decided in orders that
13 are binding on the Court.

14 So the question of how extensive
15 any additional testimony needs to be is
16 something that can be handled at the trial and
17 I would submit that it will be quite limited,
18 and does not need to go through the kind of
19 Constitutional due process histrionics that
20 are being advanced by the defendants here.

21 MR. MILLS: Your Honor, David
22 Mills for Cox. Let me just respond to that.

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1 The Media Bureau prior to the
2 rescinding of all the Media Bureau orders, did
3 suggest that Mr. Frederick is saying. But the
4 latest Media Bureau order indicates that we
5 should have proper procedures, and this should
6 be adjudicated in this setting of a hearing -
7 that was the Commission, I'm sorry.

8 And with regard to the
9 declarations that have already been filed,
10 they were sequenced. That was a complaint, an
11 answer, and then a reply. And that's all we
12 are saying here. We can't be in a position
13 where by filing simultaneous prefiled
14 testimony and then being limited to our own
15 testimony, we have no chance for our witnesses
16 to respond to the plaintiff's witnesses. We
17 either have to see their testimony and then
18 respond to it with our own prefiled direct, or
19 if there is going to be simultaneous and then
20 they testify, we have to have our witnesses be
21 able to respond to not just any new testimony
22 but to the prefiled testimony we haven't had

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1 a chance to respond to.

2 MR. FREDERICK: Your Honor, since
3 you permitted some limited depositions and
4 since the fact witnesses have already put in
5 written declarations, we would suggest that
6 the parties adhere to the schedule you have
7 already suggested of having simultaneous
8 exchange of written testimony, and if you feel
9 at the hearing that there needs to be a little
10 bit of extra time so that the defendants'
11 witnesses can say something on direct that
12 they feel they need to say, we don't have any
13 objection to that kind of process.

14 But we would object to something
15 that further slows down the process by having
16 a sequencing of testimony that is really not
17 necessary in this proceeding.

18 JUDGE SIPPEL: Well, you keep
19 saying it's not necessary, and I guess I can't
20 buy it now. I don't know what is going to be
21 necessary as we go deeper into this. I'll
22 make that decision, but I can't decide today